NO. 32107-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SUSAN K. PRENDERGAST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Anna M. Laurie, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

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A. ASSIGNMENT OF ERROR

The trial court denied appellant a fair trial by admitting irrelevant propensity evidence.

Issue pertaining to assignment of error

Appellant was charged with one count of forgery based on a single check. Over defense objection, the court admitted evidence that the state's handwriting expert had reviewed several other checks appellant allegedly forged on the same account. Where the uncharged checks did not form the basis of the expert's opinion that appellant forged the check at issue but served only to demonstrate appellant's propensity for forgery, did admission of the uncharged-crimes evidence deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On February 26, 2004, the Kitsap County Prosecuting Attorney charged appellant Susan Prendergast with one count of forgery. CP 1; RCW 9A.60.020(1). The case proceeded to jury trial before the Honorable Anna M. Laurie, and the jury entered a guilty verdict. CP 42. The court imposed a standard range sentence, and Prendergast filed this timely appeal. CP 45, 52.

2. Substantive Facts

On October 30, 2003, Jason Walker was working as manager of the Big O Tires store in Port Orchard, when a man named Marvin Collins called to ask about a tire remount. Walker quoted a price and told Collins he could bring the tire in that morning. 2RP[1] 4. Collins arrived at the store a short time later. He was accompanied by a woman who Walker did not know and who was not introduced to him. 2RP 6.

Isaac Mangum, a technician at Big O Tires, saw Collins and spoke to him briefly. 2RP 36. Mangum knew Collins from a time in his life when he was using drugs and committing thefts and forgeries. He also knew some of Collins's girlfriends, including Susan Prendergast. 2RP 31-32. When Mangum noticed a woman waiting for Collins in his car, he asked who it was, and Collins told him it was Prendergast. 2RP 36. After this conversation, Collins dropped off the tire and left the store for about an hour and a half. 2RP 36.

Collins returned around 11:00 a.m. to pick up the tire, again accompanied by a woman. 2RP 8, 21. Walker believed it was the same woman who had been with Collins earlier. 2RP 8. The woman wrote a check for the service, on an account belonging to Dorinda McFarland of

[1] The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—8/2/04; 2RP—8/3/04; 3RP—8/4-5/04; 4RP—8/13/04.

Port Townsend, Washington. Walker asked for identification, which the woman provided, and he then prepared an invoice detailing the work performed, the amount paid, and the method of payment. 2RP 9-10. Later that day, Walker showed the check to Mangum, who said that he knew the woman who wrote the check, and her name was not Dorinda McFarland. 2RP 14.

A few days later, the McFarland check was returned for non-sufficient funds. 2RP 12. Walker then called McFarland, using the telephone number on the check, to ask her to come in and pay for the service. When the woman he spoke to told him that she did not write the check and that her checks had been stolen, Walker called the police. 2RP 13. Although he did not initially mention Mangum's name, Walker told the police about Mangum's suspicions that Susan Prendergast was the person who wrote the check. 2RP 14-15.

Kitsap County Sheriff's Deputy Mark Gundrum interviewed Walker and Mangum and showed them photographic lineups in an attempt to identify the suspects. Both picked Marvin Collins out of the male lineup. 2RP 15, 17, 40. Walker, who had personally dealt with the woman who wrote the forged check, was unable to identify anyone from the female montage, which included a photograph of Prendergast. 2RP 18. Mangum did not speak to or assist the woman in the shop that day.

But he knew Prendergast, knew she had been with Collins when he dropped off the tire, and believed she had written the forged check. He picked Prendergast's photograph out of the lineup. 2RP 42, 44.

During his investigation, Gundrum interviewed Prendergast twice. 2RP 57. Both times Prendergast told Gundrum that she had gone to Big O Tires with Collins on October 30 when he dropped off the tire. She did not go back with him to pick it up, however. 2RP 59-60, 62.

When other stolen McFarland checks started surfacing, Gundrum made copies of all the forged checks, including the one to Big O Tires, and sent them to a forensic handwriting analyst. He also sent six known examples of Prendergast's signature. 2RP 51-52; 3RP 121. Based on the analyst's opinion that Prendergast had written the forged checks, the state charged Prendergast with one count of forgery for the check written to Big O Tires. CP 1-5.

Prior to trial, Prendergast moved to exclude reference by the state's witnesses to any allegedly forged checks other than the check for which she was charged. CP 9; 1RP 9. Defense counsel noted that, although both the state and defense handwriting experts had examined all the questioned checks in conducting their analyses, the issue at trial was whether the charged check was comparable to known handwriting samples from Prendergast, not whether the all the questioned checks were comparable.

1RP 10. Counsel argued that even if the uncharged checks were somehow relevant to the experts' opinions, any probative value would be outweighed by the highly prejudicial nature of the uncharged-crimes evidence to the defense. 1RP 11.

The state objected to exclusion of the uncharged checks, arguing that a limiting instruction would sufficiently remedy the prejudice. 1RP 9-10. The prosecutor averred that the existence of several questioned samples was integral to his expert's opinion that Prendergast was the author of the charged check. 1RP 13. He believed that reducing the number of questioned check samples the expert could testify about would somewhat weaken the expert's ability to give an opinion. 1RP 14.

The court did not specifically find that evidence of the uncharged checks was relevant to any material issue at trial. It did, however, purport to balance the "relevance and the ability of the state to preserve its arguments, as well as any prejudice to the defendant," by allowing the state's expert to use just one of the uncharged checks and giving a limiting instruction with regard to that evidence. 1RP 14-15; CP 35.[2]

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[2] After ruling that the uncharged-crime evidence would be admitted, the court directed defense counsel to prepare a limiting instruction. 1RP 15. Counsel submitted and the court gave the following instruction:

> Evidence of checks other than number 3845 was presented to you, the jurors, for the sole purpose of providing additional questioned writing to the forensic document examiners. You must not consider this evidence for any other purpose.

CP 35.

At trial, Deputy Gundrum identified the uncharged check the state's expert would use in his testimony as "one of the checks in question that was passed. From looking at this, I don't know if it was the Safeway in Belfair or one in Pierce County or the Tacoma area, but it's a copy of one of the stolen checks from the victim, Dorinda McFarland." 2RP 51. He went on to say that "everything that I collected I sent off for handwriting analysis." Id.

Robert Floberg, the state's handwriting expert, testified that he compared known signature samples from Prendergast with questioned samples, including the check to Big O Tires. He told the jury, "The officer sent me checks that were in question – and there are a number of them – explained to me that they were forged checks, and he also sent several samples of the suspect's handwriting." 3RP 77.

Floberg testified that he first compared the questioned samples, looking for consistencies. Based on the number of consistencies, he "formed the opinion that all the checks were done by a common author." 3RP 82. Next, Floberg demonstrated for the jury how he compared the Big O Tires check to known signatures from Prendergast. 3RP 83, 85-86. He explained that he believed there were enough consistencies between the writing on the questioned check and the known writing samples to conclude that Prendergast wrote the check to Big O Tires. 3RP 97.

The defense presented testimony from Heather Carlson, a forensic document examiner in private practice. 3RP 130. Carlson testified that she was provided the same documents reviewed by Floberg, but she was unable to draw a conclusion about the authorship of the check at issue from that limited information. 3RP 138. She did not believe the six known signatures Floberg relied on were sufficient for comparison. She therefore requested further writing samples from Prendergast. 3RP 138, 157-58.

Jim Harris, the defense investigator, collected both dictated and freestyle writing samples from Prendergast. 3RP 195. For the dictated samples, Harris gave Prendergast blank check forms and told her what to write. He noticed nothing peculiar about the fluidity or speed of Prendergast's writing as she provided those samples. 3RP 196-97. For the freestyle sample, Harris told Prendergast to write a letter to someone but did not tell her what to write. Again, there was nothing peculiar about the speed or fluidity of her writing. 3RP 198-99.

Carlson found numerous similarities in the requested writings collected from Prendergast over different dates, yet there were many significant differences between the requested check samples and the check at issue. 3RP 152-54. She concluded, based on standards routinely

accepted in her field, that it was highly probable Prendergast did not write or sign the Big O Tires check. 3RP 143, 156.

C. ARGUMENT

EVIDENCE OF THE UNCHARGED CHECKS SHOULD HAVE BEEN EXCLUDED BECAUSE IT WAS NOT NECESSARY TO THE EXPERT'S OPINION AND SERVED ONLY TO DEMONSTRATE PRENDERGAST'S PROPENSITY TO COMMIT FORGERY.

The court below denied the defense motion to exclude reference to any checks Prendergast allegedly forged other than the check charged in the information. Defense counsel argued that this evidence of other uncharged crimes was unfairly prejudicial to the defense and should be excluded under ER 404(b).[3] Although the court did not specifically identify the purpose it believed this evidence of uncharged crimes would serve, it seems to have accepted the state's argument that the evidence was relevant to the opinion of the state's expert. 1RP 14.

In forming an opinion, an expert may rely on information which is not generally admissible, so long as that information is of the type reasonably relied on by experts in the field. ER 703. Further, ER 705 allows an expert to give the reasons for his or her opinion. Nonetheless,

[3] ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

rules 703 and 705 should not be construed so as to "bootstrap" into evidence inadmissible information that is not necessary to help the jury understand the expert's opinion. State v. Martinez, 78 Wn. App. 870, 880, 899 P.2d 1302 (1995), review denied, 128 Wn.2d 1017 (1996).

> While Rule 703 permits an expert witness to take into account matters which are unadmitted and inadmissible, it does not follow that such a witness may simply report such matters to the trier of fact: The Rule was not designed to enable a witness to summarize and reiterate all manner of inadmissible evidence.

Id. (quoting 3 David Louisell & Christopher Mueller, FEDERAL EVIDENCE § 389, at 663 (1979)).

In Martinez, the defendant was charged with first degree arson after a fire damaged his motorcycle dealership. 78 Wn. App. at 872. At trial, the defense expert testified at length regarding his opinion that the store's furnace, not arson, had caused the fire. He was not, however, permitted to testify about what witnesses told him if their statements differed from their trial testimony or they did not testify at trial. Id. at 878-79. The defendant argued on appeal that his expert's testimony was improperly restricted, but this Court affirmed. After discussing the purpose and application of ER 703 and ER 705, this Court held that the trial court properly excluded hearsay statements which were not necessary to explain the basis of the expert's opinion. Id. at 880-81.

Here, as in Martinez, the inadmissible information considered by the state's expert should have been excluded because it was not necessary to explain the basis of his opinion. Floberg testified that he received several questioned checks, and the first step in his analysis was to compare those checks to each other. Based on the number of consistencies between the documents, Floberg concluded that the same person wrote each of the checks. 3RP 82. His next step was to compare the questioned check with known signature samples from Prendergast. After this comparison, Floberg formed the opinion that Prendergast wrote the check at issue. 3RP 85-86, 97.

The jury did not need to know about the first step in Floberg's analysis—his comparison of multiple forged checks—to understand the second step—his comparison of the charged check to Prendergast's known writing. Floberg testified that these were two separate inquiries, and the first was made solely to determine whether more than one person was involved in the crimes. 3RP 82. Floberg's comparison of the various forged checks was not the basis for his conclusion that Prendergast forged the check in question. Evidence rules 703 and 705 therefore do not support the court's admission of evidence regarding the uncharged checks.

While evidence of the other forgeries did nothing to enhance the jury's ability to understand Floberg's opinion, that evidence did tend to

establish Predergast's propensity to commit forgery. The jury heard that there were several forged checks, all relating to the same victim.[4] It further heard Floberg's conclusion that Prendergast had written all of the questioned checks. Evidence that Prendergast committed other forgeries tends to prove she has a propensity to commit forgery. See State v. Herzog, 73 Wn. App. 34, 44, 867 P.2d 648, review denied, 124 Wn.2d 1022 (1994). But when evidence of uncharged crimes is relevant only to demonstrate the defendant's criminal propensities, that evidence must be excluded. ER 404 (b); Herzog, 73 Wn. App. at 48-49.

It is fundamental that a defendant should be tried based on evidence relevant to the crime charged, not convicted because the jury believes she is a bad person who has done wrong in the past. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). In light of this principle of fundamental fairness, ER 404(b) forbids evidence of prior acts which establishes only a defendant's propensity to commit a crime. State v. Wade, 98 Wn. App. 328, 333, 989 P.2d 576 (1999). This Court noted the reasoning underlying this rule in Herzog:

> The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not

[4] Although only one uncharged check was physically admitted in evidence, Floberg explained that he received "a number" of forged checks. 3RP 77. Deputy Gundrum testified that all the forgeries involved the same victim. 2RP 51.

> rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Herzog, 73 Wn. App. at 49 (quoting Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168, 69 S. Ct. 213 (1948)).

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." State v. DeVincentis, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). Before a trial court may admit such evidence, it must find by a preponderance of the evidence that the claimed conduct occurred and identify on the record the purpose the evidence will serve. Even when a valid purpose can be identified, evidence of prior conduct still must be relevant to a material issue, and its probative value must outweigh its prejudicial effect. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997), cert. denied, 118 S. Ct. 1192 (1998); State v. Hughes, 118 Wn. App. 713, 724, 77 P.3d 681 (2003), review denied, 95 P.3d 758 (2004). The court's analysis must appear on the record and is reviewed for an abuse of discretion. Lough, 125 Wn.2d at 862-63. Doubtful cases should be resolved in favor of the defendant. Wade, 98 Wn. App. at 334.

The evidence of uncharged crimes admitted in this case does not satisfy this standard. The purpose of that evidence, as identified by the state and apparently accepted by the court, was to support the expert's opinion that Prendergast forged the check charged in the information. But since Floberg's comparison of the multiple questioned checks did not form the basis of that opinion, the evidence failed to serve that purpose. Because there was no valid purpose, the trial court abused its discretion in admitting evidence of the uncharged checks.

Even assuming there was some relevance to the uncharged checks beyond Prendergast's propensity for forgery, any probative value was far outweighed by the danger that the evidence would lead to a verdict based on that propensity. It was therefore error for the court to admit that evidence. See ER 403; State v. Trickler, 106 Wn. App. 727, 734, 25 P.3d 445 (2001).

In Trickler, the state was permitted to introduce evidence of other misconduct on the theory that it would help the jury understand the context in which the offense occurred. There, the defendant was charged with possession of a stolen credit card. The defendant's landlord had called the police when he found some of his possessions in the defendant's car. When the police searched the car, they found the stolen credit card, as well as several other stolen items. 106 Wn. App. at 729-30. The Court of

Appeals found that the jury's knowledge of those other stolen items was highly prejudicial and should have been excluded. 106 Wn. App. at 734. The court noted that, in theory, the state had introduced that evidence to give the jury a complete picture of the events leading to the discovery of the stolen credit card. The practical effect of its admission, however, was to allow the jury to consider the defendant's propensity to possess stolen property. The trial court therefore abused its discretion in admitting the evidence at trial. Id.

The same is true here. The state likely believed that evidence of the other forged checks would help the jury understand the expert's analysis. And that evidence did complete the picture of the steps Floberg followed in this case, although not all of those steps were relevant to his opinion. But, as was the case in Trickler, the practical effect of this evidence was to allow the jury to consider Prendergast's propensity to commit forgery. The evidence created the danger that the jury would improperly convict Prendergast, and it should have been excluded.

If the only relevance to the defendant's prior conduct is to show his propensity to commit similar acts, admission of that evidence may be reversible error. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001). Reversal is required in this case because the court's error in admitting the propensity evidence cannot be considered harmless.

The court below recognized that evidence of multiple forged checks was inherently prejudicial and believed that the balance was best struck by allowing the jury to learn of just one uncharged check. 1RP 14-15. As discussed above, evidence of the uncharged checks served no legitimate purpose and should have been excluded altogether. But the court's attempt to limit the prejudice of that evidence was not heeded at trial in any event. Both Gundrum and Floberg made it clear that there were several forged checks relating to the same victim which Prendergast was alleged to have written. 2RP 51; 3RP 77, 82.

The court's attempt to mitigate the prejudice of the uncharged-crimes evidence through a limiting instruction was similarly ineffective. As directed by the court, defense counsel prepared an instruction regarding the evidence of uncharged checks. In accordance with the court's ruling, the jurors were instructed that that evidence was admitted for the purpose of "providing additional questioned writing to the forensic document examiners." CP 35. Floberg testified, however, that he used those additional questioned writings to determine that the same person—Prendergast—forged all of the questioned checks. In other words, the expert used the questioned writings to establish Prendergast's propensity for forgery. Thus, while the instruction accurately encompassed the

court's reason for admitting the uncharged check, it could not eliminate the prejudice from this propensity evidence.

There is a tendency for the jury "to be unduly swayed by character, judging the person rather than the evidence in the case." Aronson, Robert H., The Law of Evidence in Washington, § 404-06 (3d ed. 1999). Even more persuasive than general evidence that the defendant is a "criminal type" is evidence of a specific propensity for committing the charged crime. Herzog, 73 Wn. App. at 44. That is precisely what the jury heard in this case: That Prendergast had a specific propensity to commit forgery—indeed, to commit that offense by forging checks from this particular victim.

Because the jury heard this propensity evidence, it likely began its deliberations with the presumption that Prendergast acted in conformity with that character trait. See State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987) (propensity evidence has the effect of stripping away the presumption of innocence). Relying on that presumption, the jury likely disregarded Prendergast's alibi evidence[5] and the testimony from the defense expert. Because there is a reasonable probability that erroneous

[5] Michelle Cronister testified that Prendergast had spent the day of October 30, 2003, at her house. She was dropped off sometime between 9:00 and 9:30 in the morning and stayed until Marv Collins picked her up later that afternoon. 3RP 185-86. Cronister was certain of the date because it was her mother-in-law's birthday and Prendergast was going to help her pick out a present. 3RP 188.

admission of the propensity evidence affected the outcome of the case, the error cannot be considered harmless. See Pogue, 104 Wn. App. at 988. This Court should reverse Prendergast's conviction.

D. CONCLUSION

Admission of irrelevant propensity evidence denied Prendergast a fair trial, and her conviction must be reversed.

DATED this ___ day of October, 2004.

Respectfully submitted,

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CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant